IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.740 of 1999
In
Summary Suit No.3245 of 1992

Rashtriya Chemicals & Fertilizers Limited, Public Limited Company, having its office at "Priyadarshini", Sion, Bombay 400 022. .. Appellants (Org.Plaintiffs)

Versus

1. The Saraswat Co-operative Bank Ltd., Mumbai, 'Transferor Bank' Office at 'Madhukosh', S.V.Savani Path, Girgaum, Mumbai 400 004.

2. M/s.Raja Chemicals, a firm carrying on business at 364/70 Samuel Street, Vadgudi, 3rd Floor, Bombay - 400 003.

3. Pradeep Ram Rakhiani, working for gain at 364/70, Samuel Street, 3rd Floor, Bombay - 400 003. .. Respondents (Org.Defendants)

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Shri Sanjay Kothari i/b M.P.Savla & Co. for the Appellants.

Shri Y.R.Naik for the Respondent No.1.

None for the Respondent Nos.2 and 3.

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WITH

Appeal No.1001 of 1999
In
Summary Suit No.3344 of 1992

The Saraswat Co-operative Bank Ltd., having its registered office at S.V.Sohoni Path, Girgaum, Mumbai 400 004. .. Appellant (Org.Deft.No.1)

Versus

1. Rashtriya Chemicals & Fertilizers Limited, Public Limited Company, having its office at "Priyadarshini", Sion, Bombay 22. .. Respondent (Org.Plaintiffs)

2. M/s.Pradeep & Co., a Proprietory Concern, carrying on business at at 364/70, Samuel Street, Vadgudi, 3rd Floor, Bombay - 400 003.

3. M/s.Pradeep Ram Rakhiani, Prop. M/s.Pradeed & Co., working for gains at 364/70, Samuel Street, 3rd Floor, Bombay - 400 003. .. Respondents (Org.Defendant Nos.2 and 3)

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Shri Y.R.Naik for the Appellant.

Shri Sanjay Kothari i/b M.P.Savla & Co. for the Respondent No.1.

None for the Respondent Nos.2 and 3.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 5TH JUNE, 2007

JUDGMENT: (Per R.M.S.KHANDEPARKAR, J)

1. Since common questions of law and facts arise in both these appeals, they were heard together and are being disposed of by this common judgment.

2. The Appeal No.740 of 1999 has been filed by the Central Government Company - the original plaintiff against the Saraswat Co-operative Bank Ltd., who was the original defendant No.1, in respect of dismissal of Suit No.3245 of 1992. The Appeal No.1001 of 1999 has been filed by the Saraswat Co-operative Bank Ltd. against the Central Government Company in relation to the decree in Suit No.3344 of 1992. The Central Government Company is hereinafter called as "the appellant" and the Saraswat Co-operative Bank Ltd. is hereinafter called as "the respondent". The Respondent No.2 in both these appeals are firms of the Respondent No.3.

3. In both these matters, the respondent had

executed the bank guarantees on behalf of the respondent No.2 to pay the dues in relation to the goods agreed to be supplied to the respondent No.2 by the appellant assuring such payment in case of failure by the said respondent No.2 to clear such dues within the time specified in the respective bank guarantees. The maximum limit of the bank guarantees was Rs.5,00,000/- (Five Lakhs) in each of the cases. As regards Appeal No.740 of 1999 is concerned, the validity of the said bank guarantee was upto 12th January, 1991, whereas in Appeal No.1001 of 1999 it was valid upto 20th October, 1991.

4. In the Appeal No.740 of 1999, the appellant, under the letter dated 27th February, 1991, sought to invoke the bank guarantee and accordingly served a notice demanding the amount payable in terms of the bank guarantee. Similarly, in case of Appeal No.1001 of 1991, a demand was made for enforcement of the bank guarantee under the notice dated 4th October, 1991. The respondent disputed the claim of the appellant and did not pay the amount demanded under those notices. After some correspondence between the parties, since the respondent refused to pay the amount under the said bank guarantees, the appellant filed the suits bearing Suit Nos.3245 of 1992 and 3344 of 1992 for

recovery of the said amount from the respondent as well as other respondents. Inspite of the service of summons, the respondent Nos.2 and 3 did not appear nor did they seek any leave to defend the suits and consequently, the summonses for judgment issued against them in the said suits were made absolute. The matters proceeded against the respondent and after recording the evidence, a common judgment came to be passed while allowing the claim of the appellant in Suit No.3344 of 1992 thereby directing the respondent to pay the principal sum of Rs.4,79,715/- along with interest thereon at the rate of 15% per annum from the date of filing of the suit till the date of realisation of the entire amount. As far as Suit No.3245 of 1992 is concerned, the same was dismissed with costs. Hence these appeals by the aggrieved parties.

5. The Learned Single Judge while allowing the claim in Suit No.3344 of 1992 held that there was a valid demand in terms of the guarantee which was not complied with by the respondent and hence the appellant is entitled for decree. In Suit No.3245 of 1992, however, the Learned Single Judge held that the appellant had failed to make a valid demand in terms of the bank guarantee and therefore not entitled for

decree. The dispute in both the matters is in relation to validity of the demand notices under the bank guarantees.

6. Placing reliance in the decision in the matter of **Hindustan Copper Ltd. v. Rana Builders Ltd.,** reported in AIR 1999 Calcutta 229, the learned advocate appearing for the appellant has submitted that the Learned Single Judge erred in holding that the notice dated 27th February, 1991 was not in consonance with the bank guarantee executed in Summary Suit No.3245 of 1992. The learned advocate for the appellant has further submitted that the said notice clearly discloses the fact that the respondent No.2 owed the amount more than Rs.5 lakhs and the said amount having not paid and cleared by the respondent No.2, the respondent was liable to pay the same in terms of the bank guarantee, and therefore, the same was demanded from the respondent. A reference to the fact of refusal on the part of the respondent-bank to renew the bank guarantees was merely an incidental issue covered by the said notice and in no way refers the said notice to be in contravention of, or contrary to the requirements of bank guarantees in question. He has further submitted that what is required to be seen is as to whether the notice substantially

discloses the fact that the respondent No.2 had failed to clear the dues within the time specified under the bank guarantees and whether such demand was made after the expiry of such period and since both the aspects are clear from the said notice as well as that the respondents were not able to establish anything contrary thereto and not even a dispute in that regard was raised in answer to the said notice, and therefore, the Learned Single Judge erred in dismissing the Summary Suit No.3245 of 1992 filed by the appellant.

7. On the other hand, the learned advocate appearing for the respondent placing reliance in the decision of the Apex Court in **Hindustan Construction Co.Ltd. v. State of Bihar & Ors.,** reported in (1999)8 SCC 436 submitted that it is not a mere demand which can entitle the appellant to seek enforcement of the bank guarantee but it was necessary for the appellant to disclose in the said notice that such demand was made after the expiry of the period specified in the bank guarantee, and failure on the part of the respondent No.2 to pay the amount due to the appellant with said period, and unless those facts are disclosed in the said notice, it cannot be said to be in terms of the bank guarantee. According to the

learned advocate for the respondent, the demand was not in accordance with the bank guarantee, and therefore, based on such demand the appellant is not entitled to seek enforcement of the bank guarantees.

8. Upon hearing the learned advocates for the parties and on going through the records, only question which arises for consideration is that whether the notices dated 27th February, 1991 and 4th October, 1991 issued by the appellant were in consonance with the bank guarantees executed by the respondent to enable the appellant to invoke right to enforce of the said bank guarantees ?

9. With reference to the notice dated 27th February, 1991 in Summary Suit No.3245 of 1992, the Learned Single Judge has held that the cause for invoking the Bank Guarantee as revealed from the said notice had been for non receipt of the renewed guarantee, and not for the non payment of dues by the defendant Nos.2 and 3 within 60 days of issuance of the invoices, and therefore, there was no demand for invoking bank guarantee in terms of the said bank guarantee prior to the filing of the suit and on that count, the suit has been dismissed. Perusal and proper reading of the said notice of invocation dated

27th February, 1991, however, we find it to the contrary. The said notice discloses the following facts:-

(a) The bank guarantee had not been renewed;

(b) The appellant lodged the claim for amount of Rs.5 Lakhs;

(c) The concerned party owed more than a sum of Rs.5 Lakhs;

(d) The demand was made in terms of the bank guarantee;

(e) The demand was to be complied with without any demure.

10. Undisputedly, the bank guarantee clearly assured the appellant to pay the amount due and payable under the said bank guarantee without any demur merely on a demand by the appellant that the amount claimed has become due by reason of the buyer's failure to pay the appellant's invoices within 60 days. The bank guarantee also discloses that any such

demand made by the appellant on the respondent would be conclusive as regards the amount due and payable by the bank under the guarantee.

11. The terms of the bank guarantee read with the said invocation letter apparently discloses that the appellant had clearly intimated the bank that the respondent Nos.2 and 3 owed the appellant more than a sum of Rs.5 Lakhs and yet they had not renewed the bank guarantee and the said amount had become due and payable in terms of the bank guarantee, and therefore, the demand was lodged. Once the appellant had made it clear that the amount was demanded in terms of the bank guarantee after the said amount had become due by the respondent Nos.2 and 3, and the claim was lodged for the said sum by the appellant, it obviously disclosed clear indication by the appellant to invoke bank guarantee in accordance with the terms of the bank guarantee. Undoubtedly, the bank guarantee could not have been invoked unless the respondent Nos.2 and 3 had failed to make payment within 60 days from the date of issuance of invoices by the appellant pursuant to the supply of goods to the said respondents. In fact, the bank had clearly understood the import of the said letter of invocation dated 27th February, 1991 and the same is clear from the correspondence

between the parties which is on record as also the defence taken by the bank to the effect that "in the instant case, as is clear from the records of the case, the principal debtor has paid all the amounts for the value of goods purchased and the bills of which the Plaintiffs informed to have been outstanding by him and therefore, the question of bank being called upon to pay to the Plaintiffs does not arise at all." In other words, it was a specific defence of the bank that considering the facts of the case which revealed that the respondent Nos.2 and 3 having cleared all outstanding dues within the specified time i.e. within 60 days from the date of issuance of the invoices/bills, there was no occasion for the appellant to invoke the bank guarantee or to demand payment under the bank guarantee. It is, therefore, clear that the bank had clearly understood that the letter of invocation dated 27th February, 1991 was issued as a invocation letter in terms of the bank guarantee in question. There is no dispute between the parties that the bank had executed bank guarantee in question and the appellant was entitled to invoke the bank guarantee, as stated above. Being so, the Learned Single Judge clearly erred in holding that the invocation letter did not comply with the requirement of the bank guarantee. The finding that it was

necessary for the appellant to aver that the amount under the bank guarantee had become due for non payment by the defendant Nos.2 and 3 of the dues or of the invoices of more than 60 days and that there was no such averment is not borne out from the record inasmuch as that the letter dated 27th February, 1991 apparently discloses such a demand was with reference to the bank guarantee and the letter specifically refers to the bank guarantee in question and the demand being made in terms of the bank guarantee. Besides, it was clearly understood by the bank that the guarantee was not being sought to be enforced prior to the expiry of the period of 60 days from the date of issuance of the invoices.

12. Once it was a specific defence raised by the bank that the respondent Nos.2 and 3 had cleared the liability within 60 days and that therefore the bank was not liable to pay in terms of the bank guarantee and in that regard reliance was sought to be placed on the statement of accounts pertaining to 16 invoices/bills for supply of Sodium Nitrate and the details of payment alleged to have been made by M/s.Raja Chemicals in terms of the cheques issued between 16th December, 1989 to 31st January, 1990, it was necessary for the bank to establish the same by

placing on record cogent evidence in support of the said plea. Undoubtedly, the respondent/bank in that regard placed on record the Exhibit-5 i.e. letter dated 11th April, 1992 issued by the bank to the Director of the appellant/company. The said letter discloses a chart allegedly revealing the number of invoices, the dates of issuance of invoices, the amounts for which the invoices were issued, the cheque numbers and the dates on which the said amounts were paid. The said chart reads thus:-

Claimed raised for			Payment made by M/s.Raja Chemicals	
Invoice No.	Date	Amount Rs.	Cheque No.	Date
903175/466	08.12.89	33,370.00	259058	16/12/89
903176/466	08.12.89	13.348.00	259060	16/12/89
903178/466	09.12.89	33,370.00	259061	19/12/89
903180/466	11.12.89	26,965.12	259065	22/12/89
903182/466	12.12.89	32,915.00	259066	27/12/89
903184/466	13.12.89	33,370.00	259068	27/12/89
903185/466	13.12.89	16,205.00	259072	28/12/89
903197/466	21.12.88	27,729.12	327762	30/12/89
903201/466	27.12.89	25,928.00	262458	05/01/90

903218/466	04.01.90	41,599.68	262462	10/01/90
903221/466	05.01.90	34,211.40	262463	10/01/90
903230/466	11.01.90	43,381.00	262461	10/01/90
903231/466	12.01.90	43,062.24	262470	17/01/90
903232/468	13.01.90	35,885.20	327775	29/01/90
903233/468	15.01.90	35,885.20	262478	27/01/90
903234/466	15.01.90	48,359.50	262479	31/01/90

Simultaneously, the respondents had also placed on record, along with the written statement, a copy of the extract of the Account No.2729 of the respondent No.2 with the respondent/bank for the period from 1st January, 1990 till 6th February, 1990. The chart regarding invoices is sought to be related to the cheques by which the amounts were stated to have been paid for the period from 16th December, 1989 to 31st January, 1990. The extract of the Bank Account was relating to the period from 1st January, 1990 to 6th February, 1990. In the chart of invoices, the Invoices dated 8th December, 1989 to 13th December, 1989 are stated to have been paid by cheques having six digit numbers issued by the respondent No.2 starting with first two digits being "25". Perusal of the statement of claim however discloses only two cheques having been issued of six digit numbers of

which first two digits "25" and were encashed on 5th January, 1990 bearing Cheque No.259074 for Rs.53,720.60ps. and the second being encashed on 24th January, 1990 bearing Cheque No.259075 for Rs.75,000/-. None of the invoices issued during the period from 8th December, 1989 to 13th December, 1989 were issued for the sum of Rs.53,720.60ps. or for Rs.75,000/-, nor the total amount of seven invoices issued during the said period corresponds to the total of the amount withdrawn under those two cheques. As regards the cheques which are stated to have been issued in the month of January, 1990, the first of such cheques bears No.262458 which was encashed on 5th January, 1990 for the sum of Rs.43,826.52ps. whereas the invoice in respect of which the same was stated to have been utilised was issued only for the sum of Rs.25,928/-. As far as the Cheque No.262462 is concerned, that is shown to have been encashed on 10th January, 1990 for the sum of Rs.40,851.84ps. but the invoice dated 4th January, 1990 was issued for Rs.41,599.68ps. The cheque bearing No.262463 was cleared on 10th January, 1990 for Rs.15,000/- whereas the invoice dated 5th January, 1990 in respect of which the said cheque is stated to have issued, was for an amount of Rs.34,211.40ps. The cheque bearing No.262461 which was issued on 10th January, 1990 and

was cleared on 10th January, 1990 for Rs.66.209/- whereas the invoice to which it is sought to be related was issued on 11th January, 1990 for Rs.43,381/-. In other words, the dates of issuance of the invoices do not tally with the dates of issuance of cheques. The cheques could not have been issued prior to the date of issuance of the invoices. None of the cheque amounts tallies with the amount of any of the invoices. So also total amount under the invoices does not tally with the total amount under the cheques issued during the relevant period. The Cheque No.262470 which is stated to have been issued on 17th January, 1990 was indeed encashed on the same day i.e. 17th January, 1990, for Rs.69,218.90ps. whereas the invoice dated 12th January, 1990 was for Rs.43,062.24ps. The Cheque bearing No.327775 dated 29th January, 1990 does not find encashment in the Bank Account submitted by the party. As far as Cheque No.262478 is concerned, the same was stated to have been issued on 27th January, 1990 and was infact encashed on that date only for Rs.35,000/-, however, the invoice dated 15th January, 1990 in respect of which it was stated to have been utilised was for Rs.35,885.20ps. Lastly the Cheque No.262479 dated 31st January, 1990 was infact encashed on the same day i.e. 31st January, 1990, for Rs.73,944.44 ps.,

however, the invoice dated 15th January, 1990 in respect of which it was stated to have been utilised was for Rs.48,359.50 ps. In other words, none of the cheques tallies with the invoices either with respect to the amount withdrawn or there is any evidence apart from mere chart produced in that regard to the effect that the amounts which were withdrawn under those cheques were actually paid by the respondent No.2 to the appellant. Merely because the respondent no.2 on the relevant dates had encashed certain cheques or withdrawn certain amount and the cheque numbers of which are enumerated in the chart, that itself does not amount to payment of amount under the said cheques to the appellant. Undisputedly, the cheques were not issued in the name of the appellant. On the contrary, the bank account clearly shows withdrawal of the amount by clearing of the cheques but it nowhere discloses that the cheques were cleared in favour of the appellant. So also the cheque amount does not tally with the amount of bills/invoices. In case of one of the cheques, the same was apparently issued day prior to the day of issuance of the invoices. One wonders how the cheque could have been issued without even knowing the invoice amount. Apparently, therefore, the chart which was furnished by the respondent did not establish that the amounts under

the invoices were actually paid by the respondent No.2 to the appellant within 60 days from the date of issuance of the invoices. Undisputedly, apart from placing on record the said chart, no other evidence has been led by the respondent about payment of amount under the said invoices to the appellant. It is not in dispute that the appellant had issued the said invoices pursuant to the supply of goods to the respondent No.2. Once these facts are not in dispute and it is also a matter of record that the respondent had not established that the amount under the invoices was actually paid within 60 days from the date of issuance of the invoices, the demand having been made in terms of the bank guarantee and on the face of bank guarantee such demand is to be presumed as conclusive evidence regarding the amount due and payable by the bank to the appellant, the burden of proof was squarely upon the respondent which the bank has utterly failed to discharge.

13. For the reasons stated above, therefore, in Summary Suit No.3245 of 1992, the appellant had clearly established that the appellant had served a proper invocation notice upon the respondent and yet the respondent failed to comply with its obligation and hence the appellant is entitled for a decree as

prayed for.

14. As regards Summary Suit No.3344 of 1992 is concerned, the Learned Single Judge has clearly held that the respondent No.1 had issued a clear invocation notice in terms of the guarantee in question. The said finding is clearly borne out from the record inasmuch as that there was a clear demand made for payment in terms of the bank guarantee. The guarantee clearly stated that once such a demand is made in terms of the bank guarantee, it would be conclusive proof of the liability of the respondent Nos.2 and 3 to the appellant. Being so, the burden was squarely upon the respondent to disprove the claim of the appellant under the invocation letter. The Learned Single Judge on perusal of the entire materials on record has clearly held that the bank had failed to discharge its burden. Indeed, the bank has failed to lead any evidence in that regard. The testimony of the Manager of the appellant clearly discloses details of various invoices which were issued by the appellant to the Respondent No.2 and inspite of which the respondent No.2 had failed to make payment within 60 days. The respondent could not produce any evidence regarding payment of dues under any of those invoices. Under the circumstances, no fault can be found with

the findings arrived at by the Learned Single Judge regarding failure on the part of the respondent in discharging the liability under the bank guarantee in question. There is no case made out for interference in the impugned judgment of the Learned Single Judge as far as it relates to Summary Suit No.3344 of 1992.

15. The Apex Court in **Hindustan Construction Co.Ltd.'s case (supra)** has observed that a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. It was specifically held that "what is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the

beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad." The ruling of the Apex Court clearly fortifies the view we are taking on the analysis of the materials on record in the case in hand bearing in mind the terms of guarantee therein. Once the existence of prerequisites for enforcement of bank guarantee is established, the preconditions for enforcement thereof stand proved and the bank therefore is obliged to perform its obligation under the guarantee. In the case in hand, the appellants had not only issued notices but had joined the respondent Nos.2 and 3 as the party defendants in the suit and they had not contested the claim of the appellants about failure on the part of those respondents in the matter of payment of their dues for more than 60 days from the issuance of the date of invoices as also about their failure to clear the dues till the date of filing of the suit. That was not the case in **Hindustan Construction Co. Ltd. (supra)**. Therein the liability of the bank under the guarantee could have been only if the obligations as enumerated in clause 9 thereof were not fulfilled or there was to be misappropriation and not otherwise. Besides, the

invocation of the bank guarantee could have been only by Chief Engineer to whom the guarantee was furnished and not by Executive Engineer who had sought invocation of the bank guarantee. On facts, the decision is clearly distinguishable.

16. The learned advocate appearing for the appellant is justified in drawing our attention to the decision of Calcutta High Court in **Hindustan Copper Ltd. v. Rana Builders Ltd.,** reported in AIR 1999 Calcutta 229 and of Delhi High Court in **Puri International (P) Limited v. National Building Construction Co.Ltd. & Anr.,** reported in 1997 Bank.J 568. In **Hindustan Copper Ltd.'s case (supra),** the High Court of Calcutta, after referring to the various decisions of the Apex Court, held that "The letter of invocation in respect of the bank guarantees cannot be equated with the documents that are required to be tendered under letters of credit for the reason that in a letter of credit, the documents to be tendered for honouring the bills have been specified thereunder and the documents should conform to the description given in the letters of credit." It was further held that "If the bank has understood the purport of the notice, which no doubt the bank well understood, then the bank cannot be heard to say that there has been no

statement in the notice that the defendant No.1 has suffered loss and/or damages on account of the defaults committed by the plaintiff." It was then ruled that "If there is substantial compliance with the terms of the guarantee in the notice that would be sufficient and if there be no defect in understanding the nature and purport of such notice by the Bank, the bank is bound to honour its commitment under the guarantee."

17. In **Puri International (P) Limited's case (supra),** the High Court of Delhi, after referring to the various decisions of the Apex Court, held that "the Supreme Court has set out the summary of law in respect of enforcement of Bank guarantee holding that when in the course of commercial dealings an unconditional Bank guarantee is given or accepted, the beneficiary is entitled to realise such a Bank guarantee in terms thereof irrespective of any pending disputes. It is further held that the Bank giving such a guarantee is bound to honour as per its terms irrespective of any disputes raised by the customer."

18. Considering the above decisions with which we are in respectful agreement and considering the facts of both the cases in hand, we do not find any

justification for interference in the impugned judgment as far as it relates to Summary Suit No.3344 of 1992. Further, the judgment as far as it relates to Summary Suit No.3245 of 1992 cannot be sustained and is liable to be set aside and the Summary Suit No.3245 of 1992 is to be decreed and is hereby decreed with costs. Accordingly, the respondent-bank is directed to pay a sum of Rs.6,53,428/- along with further interest at the rate of 15% per annum on the sum of Rs.5 lakhs from the date of the suit till the date of realisation.

19. The appeal No.740 of 1999 therefore is allowed in above terms. The appeal No.1001 of 1999 is dismissed with costs. Both the appeals are accordingly disposed of with costs.

(R.M.S.KHANDEPARKAR, J)

(D.G.KARNIK, J)